Supreme Court, U.S.
FILED
AUG 29 2003
OFFICE OF THE CLERK

No. 02-1343

IN THE
Supreme Court of the United States

ENGINE MANUFACTURERS ASSOCIATION AND WESTERN STATES PETROLEUM ASSOCIATION,

Petitioners,

v.

SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ALLIANCE OF AUTOMOBILE MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL AUTOMOBILE DEALERS ASSOCIATION, NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION, AND TRUCK MANUFACTURERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether local government regulations prohibiting the purchase of new motor vehicles with specified emission characteristics—which are otherwise approved for sale by state and federal regulators—are preempted by the Clean Air Act, which expressly preempts any state or local "standard relating to the control of emissions from new motor vehicles." 42 U.S.C. § 7543(a).

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INTERESTS OF *AMICI CURIAE*

The Alliance of Automobile Manufacturers, the American Petroleum Institute, the Association of International Automobile Manufacturers, the California Motor Car Dealers Association, the National Association of Manufacturers, the National Automobile Dealers Association, the National Petrochemical and Refiners Association, and the Truck Manufacturers Association respectfully submit this joint brief as *amici curiae* in accordance with Supreme Court Rule 37.3.[1]

Amici represent the automobile manufacturers and dealers that manufacture and distribute virtually every vehicle sold in the United States, as well as the energy companies that produce and market the petroleum products used in most of those vehicles.[2] Vehicles and fuels sold in this country are subject to comprehensive emission control regulation by the U.S. Environmental Protection Agency ("EPA" or "the Agency") under title II of the Clean Air Act,

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[1] The parties consented to the filing of this brief, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for any party, and no persons or entities other than *amici curiae*, its members, and counsel made a monetary contribution toward the preparation or submission of this brief.

[2] The Alliance of Automobile Manufacturers, the Association of International Automobile Manufacturers, and the Truck Manufacturers Association represent manufacturers and distributors of new passenger cars and trucks located in the United States and overseas. The California Motor Car Dealers Association and the National Automobile Dealers Association represent new vehicle dealers in California and other parts of the United States. The American Petroleum Institute and the National Petrochemical and Refiners Association represent companies engaged in all segments of the U.S. petroleum industry, and the National Association of Manufacturers represents a broad group of industrial companies and member organizations serving U.S. manufacturers.

as amended, 42 U.S.C. §§ 7521-7590. EPA sets performance standards for vehicles and fuels that leave to industry engineers the choice of specific engine designs and fuel specifications needed to reduce emissions.

EPA's technology-neutral regulations flow from the Clean Air Act, which requires stringent emissions control while considering costs and other factors. The Agency's rules thus reward innovation while also protecting the environment. Its rules over three decades have required increasing reductions in smog-forming emissions from new gasoline vehicles, including light-duty trucks and sport-utility vehicles, so that today's emissions are a small percentage of the emissions from uncontrolled vehicles.[3] EPA's regulations for gasoline-powered vehicles in the coming years are so stringent that there is no longer any significant difference between the federal rules and those in California, even though California has in the past led the nation's effort to lower automotive emission levels. For over 35 years manufacturers have met these ever-tightening performance standards from EPA and California, and manufacturers have relied upon the Clean Air Act and the well-settled national policy that only EPA and California may set such standards.

Many heavy-duty trucks operate on diesel fuel, rather than gasoline. EPA has adopted rules that regulate new heavy-duty vehicles, along with their fuel, as a system. As with its other automotive air pollution rules, EPA's heavy-duty vehicle standards leave the choice of specific technologies to the engineers employed or sponsored by the members of *amici*. The targets are ambitious. The heavy-duty new-vehicle regulations adopted by EPA in December 2000 are expected to reduce emissions from diesel-powered

[3] *See* 65 Fed. Reg. 6,698 (Feb. 10, 2000) (final rule for model year 2004 and later new passenger cars and light-duty trucks).

trucks and buses by 95 percent.[4] When combined with the upcoming rules for other new vehicles, the requirements for new heavy-duty trucks sold outside California are virtually the same as the rules for new trucks sold inside California.

This case involves a set of regulations that are inconsistent with the coordinated national and California strategy to reduce automotive air pollution through performance-based rules. The regulations at issue, the Fleet Rules adopted by the South Coast Air Quality Management District ("SCAQMD"), ban some of the nation's cleanest advanced technology vehicles from several important markets in southern California. Those markets involve specified public and private fleets of 15 or more vehicles.[5]

SCAQMD's rules were apparently premised on a belief that vehicles designed to use natural-gas and other alternative fuels would be inherently cleaner than gasoline- or diesel-powered vehicles. That technological assumption is already obsolete. Gasoline- and diesel-powered vehicles produced by *amici's* members can achieve the same emission levels as natural-gas vehicles. But they are shut out of the fleet markets governed by SCAQMD's rule, and competition between different fuels and technologies has been stifled.

The interests of *amici* extend well beyond the immediate impact of the Fleet Rules. For more than 35 years, section 209 of the Clean Air Act has prohibited local emissions control of the new-vehicle market. Congress has assigned environmental regulation of new motor vehicles to EPA, with an exception for the State of California, which is allowed to enforce its own rules if those rules have been reviewed and approved by EPA. EPA's coordination and

[4] *See* 66 Fed. Reg. 5,002, 5,005 (Jan. 18, 2001).

[5] *See* Petitioners' Opening Brief at 14-17 (description of Fleet Rules).

supervision is critical if the nation is to reduce automotive air pollution in a cost-effective manner and with minimum disruption of an international industry.

The Fleet Rules thus violate basic principles of technological innovation and fuel neutrality. Putting aside the merits of the Fleet Rules, however, the process initiated by SCAQMD has serious national consequences. If other localities also try to establish their own rules by picking and choosing the technologies and fuels that may be purchased, the rules that govern the members of *amici* would no longer be a coordinated national program. Those requirements instead would be the end product of disconnected technology and fuel choices made by local authorities.

As SCAQMD would interpret federal law, there is no federal impediment to the City of Santa Monica, the Berkeley City Council, or any other city, dictating which new vehicles may be purchased in those jurisdictions. That outcome would be directly contrary to what Congress envisioned when it enacted title II of the Clean Air Act and is specifically prohibited by section 209. A similar adverse impact could occur to diesel fuel providers, who, after investing heavily in the technology to produce clean fuel ,may see their potential markets lost because of local bans on the purchase of diesel-powered vehicles.

SUMMARY OF ARGUMENT

Section 209(a) of the Clean Air Act prohibits the regulation of emissions from new motor vehicles by state and local governments. Only the State of California is allowed to adopt emissions control rules for new vehicles that differ from those of EPA. Before California can enforce its own rules, however, it must obtain EPA's concurrence that its rules meet criteria specified in section 209(b) of the Act, 42 U.S.C. § 7543(b), which include considerations of cost and lead-time.

The state agency in California charged with adopting rules is the California Air Resources Board (or "CARB"). Rules adopted by CARB acquire their exemption from federal preemption only by virtue of EPA's review and approval under section 209(b). The Clean Air Act does not permit state or local emissions control requirements for new vehicles that EPA has not considered and approved. 42 U.S.C. § 7543(a). Instead, states and localities are permitted to regulate the "use, operation, or movement" of registered or licensed vehicles. *Id.* § 7543(d).

Within the last five years, the standards for new vehicles adopted by CARB for the State of California and by EPA for the nation as a whole have converged. Both EPA and CARB regulations permit manufacturers to use a variety of designs to meet the same or similar performance standards. To ensure that the vehicles will achieve low pollution levels, EPA and CARB also strictly control the composition of gasoline and diesel fuel. Vehicles and fuels are thus regulated comprehensively by EPA and CARB as a system.

The Fleet Rules differ from the rules adopted by CARB and EPA, primarily because they ban gasoline- and diesel-powered vehicles from several important markets for new vehicles, without regard to whether such vehicles can in fact meet the same emission levels as "alternative" vehicles. Most important from a statutory perspective, *no officer or entity representing the State of California has submitted the Fleet Rules to EPA for review, and the Fleet Rules have not received a waiver of federal preemption under section 209(b).*

The Fleet Rules are therefore expressly preempted from enforcement by section 209 of the Clean Air Act. In addition, the Fleet Rules grate against the basic strategy of technology- and fuel-neutral emissions regulation developed by EPA, and upset the balance between stringency and cost control required by the Clean Air Act. Because they are also

not consistent with the Clean Air Act, with federal regulations and with the CARB rules approved by EPA for the State of California, the Fleet Rules accordingly are subject to conflict preemption under the principles of *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000), *Gade v. Nat'l Solid Wastes Mgmt. Ass'n,* 505 U.S. 88 (1992) , and *Hines v. Davidowitz,* 312 U.S. 52 (1941).

ARGUMENT

Petitioners have fully explained the application of section 209(a) to the Fleet Rules. *Amici* believe it is also important to examine the Fleet Rules in light of the overall structure of title II, and how the decisions of the courts below would adversely affect the nation's ability to meet the objectives of Congress in providing for federal control of new vehicle emissions regulation under the Clean Air Act.

I. THE FLEET RULES CONFLICT WITH THE STRUCTURE OF THE CLEAN AIR ACT AND THE REQUIREMENT OF EPA REVIEW.

For more than 35 years, Congress has given the federal government the primary role in regulating new motor vehicle emissions. The Clean Air Act includes a carefully defined role for the State of California to establish a separate emissions control program. However, California may proceed ***only*** after EPA's review and approval. No official or entity representing the State of California has submitted the Fleet Rules to EPA for review and approval, and insofar as the Fleet Rules apply to new-vehicle purchases by fleets not owned by municipalities or other public agencies they have no historical regulatory foundation. The Fleet Rules are an attempted end-run around the plain language and structure of the Clean Air Act and the roles it assigns to California and the EPA.

A. From the Beginning of Federal Control of New Vehicle Emissions, Congress Has Conditioned California's Regulations Upon Review and Approval by the Federal Government.

The critical text in this case is found in section 209(a) of the Clean Air Act. This section broadly preempts virtually all state and local regulation of new motor vehicle emissions:

> No State ... shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles.... No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle ... as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle....

42 U.S.C. § 7543(a). This broad, express preemption has been the clear federal policy since 1967, when Congress first expressly preempted States from adopting or enforcing emissions-related requirements for new motor vehicles. *See* Air Quality Act of 1967, Pub. L. No. 90-148, § 208, 81 Stat. 485, 501.

Motor vehicle production is a capital-intensive business. A specific model of a motor vehicle is generally manufactured at only one or two plants. When it leaves the factory, the new vehicle enters a complex and highly competitive distribution system that often extends around the globe. Congress long ago recognized those aspects of the automobile industry. In 1965, when automotive air pollution regulation was first gaining wide attention, a Senate committee expressed concern not only about the need to control harmful emissions from vehicles, but that poorly coordinated regulation of new vehicle emissions could "result in chaos insofar as manufacturers, dealers, and users are concerned." S. Rep. No. 89-192, at 6 (1965).

By 1967, various States had either adopted or were close to adopting new vehicle emissions standards. To avoid the "chaos" foretold by the Senate committee in 1965, Congress added an express preemption provision to the Clean Air Act amendments adopted in 1967. *See* Pub. L. No. 90-148 § 2, 81 Stat. at 501; H.R. Rep. No. 90-728, at 21 (1967) (preemption was "necessary in order to prevent a chaotic situation from developing in interstate commerce in new motor vehicles."); S. Rep. No. 90-403, at 33 (1967) (multiple standards would result in "economic disruption" and increased costs to consumers).

Prior to 1967, California had adopted requirements for the installation of emission control devices on certain classes of new and used vehicles.[6] At hearings held in Los Angeles in February 1967, federal officials testified that it was possible that federal regulations pertaining to new vehicle emissions at a national level would preempt the California

[6] California's regulations had been adopted by the California Department of Public Health under authority of the California Motor Vehicle Control Act of 1960. *See* James E. Krier & Edmund Ursin, POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION, 1940-1975, 117-18, 147 (1977). During the 1950s local authorities in southern California had debated adoption of rules requiring pollution control devices on new and used vehicles, but decided not to do so until technology improved. *See* Harold W. Kennedy, *The Legal Aspects of Air Pollution Control with Particular Reference to the County of Los Angeles*, 27 S. CAL. L. REV. 373, 391-94 (1954). Officials of the Los Angeles County Air Pollution Control District advocated Statewide automotive emissions controls. *See* J. Krier & E. Ursin, *supra* at 177. The only local efforts to control automotive air pollution consisted of directives by municipalities that their own fleets purchase vehicles equipped with pollution controls. *See* Harold W. Kennedy & Martin E. Weekes, *Control of Automobile Emissions—California Experience and the Federal Legislation*, 33 LAW & CONTEMP. PROBS. 297, 308 (1968).

rules.[7] Persuaded that California should be able to maintain a separate program notwithstanding the prospect of new federal regulations, Congress exempted California from the general rule of preemption. Under some circumstances—described below—Congress created an exception to the general rule on preemption for "any State which has adopted standards ... for the control of emissions from new motor vehicles ... prior to March 30, 1966," a category that included only California. *See* 81 Stat. at 501. At about the same time, in California, the California legislature created a new agency, the State Air Resources Board (now the California Air Resources Board, or "CARB"). In its chartering legislation CARB was given exclusive authority to adopt vehicle emission control rules in the State.[8]

Congress provided that CARB was not free to adopt any rules for new motor vehicles in California that it wanted. Instead, Congress required California to seek a waiver of federal preemption from the federal government. Review of California's waiver applications later was assigned to the new, federal Environmental Protection Agency in the Clean Air Act Amendments of 1970.[9] As amended in 1970, the

[7] *See Air Pollution—1967 (Automotive Air Pollution)*, HEARINGS BEFORE THE SUBCOMMITTEE ON AIR AND WATER POLLUTION OF THE COMMITTEE ON PUBLIC WORKS, UNITED STATES SENATE (90th Cong., 1st Sess.) 108-109, 115 (testimony of Dean Coston, Deputy Undersecretary of Health, Education and Welfare, and Sidney Edelman, of the Office of General Counsel, Department of Health, Education and Welfare).

[8] The 1967 Mulford-Carrell Act creating the State Air Resources Board provided that "[l]ocal and regional authorities have the primary responsibility for the control of air pollution except for the emissions from motor vehicles. These authorities may control emissions from ***nonvehicular*** sources." Cal. Health & Safety Code § 39012 (West Supp. 1973) (emphasis added); *see also* Kennedy & Weekes, *supra*, at 307-08 (Mulford-Carrell Act generally preempted local regulation of automobile emissions.)

[9] Pub. L. No. 91-604, 84 Stat. 1676.

California waiver provision in section 209 allowed the State to avoid federal preemption if its standards: (a) would be "in the aggregate, at least as protective of public health ... as applicable federal standards"; (b) were needed "to meet compelling and extraordinary conditions"; and (c) were consistent with the technological and economic feasibility requirements of section 202(a).

CARB must seek a waiver for any new set of standards it adopts.[10] In 1977, Congress amended the Clean Air Act to permit other, qualifying States to piggyback on the California waiver by adopting and enforcing vehicle emission regulations that are "identical" to "the California standards for which a waiver has been granted" for the same model year. 42 U.S.C. § 7507; *see* Petitioners' Opening Brief at 7-8.

This ensures that the nation's vehicles have to comply with either the federal vehicle emission control standards promulgated by EPA, or the California standards that have been reviewed and approved by EPA. Thus, "there are two, and only two, permissible sets of regulations limiting emissions from new cars sold in the United States"—the federal rules and the EPA-approved California rules. *Virginia v. EPA*, 108 F.3d 1397, 1401 (D.C. Cir. 1997).

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[10] When California modifies an existing requirement that has already received a waiver, as opposed to adopting a new standard, it often finds that the amendments are "within the scope" of its previous waiver. EPA has defined specific criteria that must be met before an amended regulation can be found to be within the scope of a previous waiver. The required findings are that the California amendments: (1) "do not cause the California standards, in the aggregate, to be less protective than applicable Federal standards"; (2) "do not cause California's requirements to be inconsistent with section 202(a) of the Act"; and (3) "present no new issues" affecting EPA's previous waiver determinations. 46 Fed. Reg. 36,742, 36,743 (July 15, 1981).

Section 209(b) has been administered by EPA to allow CARB, acting on behalf of the State of California, considerable discretion to adopt rules that differ from federal requirements—but only after EPA has carefully examined the California rules. Typically, EPA schedules a public hearing or requests public comment on whether to conduct such a hearing before deciding what action to take on a request from CARB for approval of new standards. *See* 42 U.S.C. § 7543(b)(1). CARB makes a practice of seeking EPA review for a variety of measures, ranging from new limits on exhaust emissions, to compulsory warranties, maintenance instructions, quotas for the sale of vehicles meeting particular standards, and manufacturer reporting requirements.[11]

A request for review of a new rule from California frequently triggers an extended technical review by EPA engineering staff and counsel.[12] In complex situations, CARB sometimes makes major changes in its proposed rules before EPA takes final action, occasionally withdrawing them from consideration by EPA or supplementing the

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[11] *See, e.g.*, 57 Fed. Reg. 24,788 (June 11, 1992) (new standards for alternative fueled vehicles); 59 Fed. Reg. 46,978 (Sept. 13, 1994) (new test procedures to enforce standards); 55 Fed. Reg. 28,823 (July 13, 1990) (reporting requirements); 63 Fed. Reg. 6,173 (Feb. 6, 1998) (warranties); 67 Fed. Reg. 60,680 (Sept. 26, 2002) (waiver application for new standards for zero-emission vehicles withdrawn by CARB); 44 Fed. Reg. 61,096, 61,100 (Oct. 23, 1979) (maintenance instructions); *see also Motor & Equip. Mfrs. Assn. v. EPA*, 627 F.2d 1095, 1103-05 (D.C. Cir. 1979) (related maintenance regulations).

[12] *See, e.g.*, 61 Fed. Reg. 53,371 (Oct. 11, 1996) (concluding 14-month review of onboard diagnostic testing rules); 57 Fed. Reg. 38,503 (Aug. 25, 1992) (concluding two-year consideration of rules for methanol-fueled vehicles); 59 Fed. Reg. 46,978 (Sept. 13, 1994) (concluding 16-month review for new test procedures); 59 Fed. Reg. 48,625 (Sept. 22, 1994) (concluding 35-month review for new standards for medium-duty vehicles).

record in order to establish compliance with the criteria in section 209(b) of the Clean Air Act.[13] EPA can approve or deny CARB's request for a waiver of federal preemption in whole or in part, or condition its approval on certain modifications in the California program needed to comply with section 209(b).[14]

EPA traditionally has interpreted section 209(b) to require it to make various findings with respect to the section 202(a) requirements before it can grant a waiver for a California standard. These include findings that "adequate technology exists with which to meet them [the California standards]" and that "adequate lead time is available in which to implement that technology."[15] Adequate lead-time must be available for "both translating the available technology into a form satisfactory for mass-production, and tooling and setting up the facilities to actually produce the vehicles."[16] In deciding whether to grant a waiver, EPA

[13] *See, e.g.*, 59 Fed. Reg. 46,978, n.1 (Sept. 13, 1994) (CARB limited initial waiver request and expected to submit new request "in order to produce a more closely aligned test procedure" with new federal test procedure); 57 Fed. Reg. 909, 911 n.9 (Jan. 9, 1992) (CARB supplemented prior submissions to take account of changes in federal standards that could affect its "protectiveness" determination); 60 Fed. Reg. 41,066 (Aug. 11, 1995) (CARB withdrew section 209 submission in order to engage in additional rulemaking).

[14] *See, e.g.*, 36 Fed. Reg. 8,172 (Apr. 30, 1971) (granting in part and denying in part waiver of preemption); 37 Fed. Reg. 8,128 (Apr. 25, 1972) (same); 40 Fed. Reg. 30,311 (July 18, 1975) (same); 42 Fed. Reg. 31,639, 31,641 (June 22, 1977) (noting waiver had been granted on condition that CARB rule would be modified). The early decisions noted *supra* established the basic parameters for obtaining a waiver, and since the early 1970s, CARB has learned how to limit and shape its rules in order to obtain waivers.

[15] *See* 40 Fed. Reg. 23,102 (May 28, 1975); 42 Fed. Reg. 2,337, 2,340 (Jan. 11, 1977).

[16] *See* 40 Fed. Reg. 30,311, 30,314 (July 18, 1975).

must also consider whether the costs of compliance would be "excessive" and consider the position of all companies competing in the California market.[17] *See Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1118 (D.C. Cir. 1979) (EPA properly considered "the economic costs of motor vehicle emission standards and accompanying enforcement procedures" in its review of California rules under section 209).

There is thus more than 35 years of established state and federal administrative practice devoted to the Congressional design of 1967: broad, express preemption of any non-federal new vehicle emission controls, and permission for California to adopt its own controls and request approval of those controls from EPA. Since 1967, Congress has not lifted the broad preemption of section 209(a), nor has it lifted the requirement that non-federal regulations must receive federal approval before they may be imposed.

The role assigned to local jurisdictions under title II is also contained in section 209. The statute, in section 209(d), reserves to local governments and States the ability to "control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." 42 U.S.C. § 7543(d); *see* section II, *infra*. Preemption is complete, however, for any "new" motor vehicle, which the Clean Air Act defines as "a motor vehicle the equitable or legal equitable title to which has never been transferred to an ultimate purchaser." 42 U.S.C. § 7550(3); *see Sims v. Fla. Dep't of Highway Safety & Motor Vehicles*, 862 F.2d 1449, 1454-1455 (11th Cir. 1989) (en banc) (state cannot attempt to enforce any standard prior to initial vehicle sale).

[17] *See, e.g.*, 43 Fed. Reg. 15,490, 15,492 (Apr. 13, 1978); 40 Fed. Reg. 30,311 (July 18, 1975).

B. The Fleet Rules Are Preempted.

The main categories of federal preemption -- *i.e.*, express, conflict and field preemption -- are not "rigidly distinct." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990). In the presence of an express preemption clause, "the task of statutory construction must in the first instance focus on the plain wording of the [preemption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Starting with the text of section 209(a), and then proceeding through the structure and legislative history of the statute, there can be no question that the Fleet Rules contravene both the express and implied intent of Congress.

1. The Fleet Rules Are "Standards" and "Conditions Precedent" on Sale.

Applying the statutory text, the Fleet Rules are expressly preempted because (1) they are "standard[s] relating to the control of emissions from new motor vehicles or new motor vehicle engines," and (2) they are a "condition precedent to the initial retail sale" of new vehicles "relating to the control of emissions." 42 U.S.C. § 7543(a).

Controlling emissions is the entire purpose and effect of the Fleet Rules. *See Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 158 F. Supp. 2d 1107, 1114 (C.D. Cal. 2001) ("*EMA*") (noting that Fleet Rules are "an effort to reduce public exposure to motor vehicle pollution"). The Fleet Rules mandate particular vehicle designs (namely, engines that run on natural gas). If local design standards related to emissions control are not preempted "standards" under the Clean Air Act, then nothing is.

The Second Circuit has offered a reasonable interpretation of "standard" under section 209(a) that gives the preemption clause discernible meaning and clearly covers the Fleet Rules: "We view 'standards relating to the

control of emissions' as describing regulatory measures intended to lower the level of auto emissions." *Am. Auto. Mfrs. Ass'n v. Cahill*, 152 F.3d 196, 200 (2d Cir. 1998). In the *Cahill* case, the State of New York had attempted to enforce a quota for the sale of vehicles that met California's zero-emission vehicle standards.[18] There was no question that the numerical emission limit that New York sought was a valid and fully-waived California standard—just as in this case, SCAQMD will surely note that the vehicles it is requiring are classified as meeting one or more emissions limits set by CARB. As Chief Judge Winter held, however, a rule specifying how many vehicles meeting a given emission limit must be sold is a "standard," because it "has no purpose other than to effect a general reduction in emissions," and is "in the nature of a command having a direct effect on the level of emissions." 152 F.2d at 200.[19]

There can be no doubt that the Fleet Rules are intended to control and lower vehicle emissions—even if the technological assumptions underlying the Fleet Rules are now obsolete. Moreover, the Fleet Rules expressly control emissions given that they incorporate a subset of vehicles approved by the CARB for purposes of emissions control. The fact that the Fleet Rules expressly limit the purchase of vehicles to a subset of California certified vehicles, while prohibiting the purchase of other vehicles that comply with California and federal emission limits,

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[18] *See* Cal. Code Regs. 13 § 1962 (2002). For the history of the *Cahill* litigation and related matters, see Arnold W. Reitze, Jr., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 307-312 (2001).

[19] *Accord Am. Auto. Mfrs. Ass'n v. Mass. Dep't of Envtl. Protection*, 163 F.3d 74, 76-77, 83-84 (1st Cir. 1998); *see also* Letter from G. Guzy, EPA General Counsel, to T. Reilly, Att'y Gen. of Mass., Sept. 15, 1999, at 9 ("A numerical emission limit, by itself, has no real meaning absent a tie to the kind and number of motor vehicles to which the limit applies") attached in Amicus Br. App. 17a - 19a.

necessarily means that the Rules are "standards" relating to control of vehicle emissions.

Other parts of title II make it clear that "standards" include not only numerical emission limits, but also rules that govern vehicle transactions. For example, section 202 specifies that in the 1994 model year, 40 percent of passenger cars must meet specific emissions levels. 42 U.S.C. § 7521(g)(1). The text of section 202 is clear that such "standards" include both the emission level and the percentage of vehicles that must meet that emission level. *See id.* (requiring "*standards* which provide that emissions from a *percentage* of each manufacturer's sales volume ... shall comply with the levels specified") (emphasis added).[20] Just as those federal requirements are expressly "standards," the Fleet Rules—which also regulate what the new-vehicle market must absorb—are likewise "standards."[21]

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[20] *See also* 42 U.S.C. § 7521(g)(2) (requiring "*standards* which provide that such emissions from a percentage of each manufacturer's sales volume of such vehicles and trucks shall not exceed the levels specified") (emphasis added); 42 U.S.C. § 7521(h) (same).

[21] In *Motor & Equipment Manufacturers Ass'n v. EPA*, 627 F.2d 1095, 1125-28 (D.C. Cir. 1979), the District of Columbia Circuit reviewed EPA's decision to waive preemption for various enforcement procedures for new motor vehicles adopted by CARB. It accepted a definition of "standard" derived from *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), that a work practice standard was not an "emission standard" under section 112 of the Clean Air Act. *Adamo Wrecking* defined an "emission standard" in that context as a "quantitative level" to be attained by use of "techniques," "controls," and "technology." *Id.* at 286. Insofar as SCAQMD's Fleet Rules incorporate both quantitative emissions limits (*i.e.*, those set by CARB) and their own percentage requirements, they would be "standards" under the D.C. Circuit's adaptation of *Adamo Wrecking*, as well as under *Adamo Wrecking* itself. *See, e.g.*, JA 60-63 (Fleet Rule 1194 mandating the purchase of vehicles meeting specifically defined emissions limits by operators of airport ground access fleets, in absence of waiver) *and* Petitioners' Opening Brief at 16-17. Since the 1977 CAA Amendments, work practice standards are emission standards.

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Turning next to the second sentence of section 209(a), there is likewise little doubt that SCAQMD has imposed a "condition precedent" relating to emissions control on the "initial retail sale" of the regulated vehicles.[22] Simply put, for certain purchasers, an otherwise legal vehicle may only be purchased or sold if, as a condition precedent to the sale, it has been certified as utilizing a type of "alternative fuel" engine SCAQMD has mandated.[23]

Attempting to circumvent section 209(a)'s express preemption and to distinguish the First and Second Circuit decisions, the district court reasoned that the plain statutory prohibition of any "standard," and the more precise prohibition of restrictions on "sale," do not cover a restriction on "purchase." Both the First and Second Circuits have held that "sales" restrictions related to emissions control are preempted "standards" under section 209(a).

The analysis by the district court to which the Ninth Circuit acceded would allow any preempted sales requirement to be re-written as a ban on the "purchase" of the very same vehicles. Such a distinction would make the express preemption provision in the statute pointless. Every new vehicle transaction involves the purchase of the vehicle

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See 42 U.S.C. § 7602(k). Whatever the scope of "standard" in the context of sections 112, 202(a) or 209(b), the scope of "standard" in section 209(a) is plainly broader given the accompanying terms. The express preemption of section 209(a) reaches "***any*** standard ***relating to*** the control of emissions" (emphasis added).

[22] The second sentence of section 209(a) states, "No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as a condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment." 42 U.S.C. § 7543(a).

[23] *See* Petitioners' Opening Br. at 14-17.

by the purchaser and the sale of the vehicle by the seller. In particular, from the standpoint of manufacturers and dealers, there is no relevant difference between a prohibition on purchases and a prohibition on sales. When Congress preempts emissions-related restrictions on the "sale" of new motor vehicles, it necessarily preempts emissions-related restrictions on the purchase of new motor vehicles.

2. The Fleet Rules Would Impermissibly Circumvent EPA Approval.

Moving beyond section 209(a), there is not an iota of textual support for "purchase" restrictions related to emissions control being permissible absent ***federal*** approval by EPA. As discussed above, CARB seeks EPA approval of everything from new limits on exhaust emissions, to fees charged to manufacturers, compulsory warranties, maintenance instructions, reporting requirements, and underhood labels that present emission information. SCAQMD has no authority to circumvent the federal approval process of section 209(b).

The Clean Air Act does not permit SCAQMD to disagree with CARB's emission standards or EPA's emission standards and strike out on its own, outside of the section 209(b) EPA approval process. Such circumvention presents a clear conflict with the regime established by Congress. Even in the absence of express preemption, SCAQMD's end-run around section 209(b) is impliedly preempted because it obviously frustrates the Congressional design. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 874 (2000); *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100-02 (1992) (plurality opinion); *id.* at 112-113 (Kennedy, J., concurring in judgment) (finding express rather than implied preemption).

If SCAQMD's non-EPA-approved gambit is permissible, then any local government may pick and choose the new vehicles it prefers for sale (or "purchase") in its jurisdiction.

Some jurisdictions might choose natural-gas-powered vehicles, others might select battery-powered electric vehicles, and others might limit part of the market to hydrogen fuel-cell vehicles. There is no principled reason why any other political subdivision in America may not do so as well. *Cf. Buckman Co. v. Plaintiffs' Legal Committee,* 531 U.S. 341, 350 (2001) (measuring frustration of federal objectives "in the shadow of 50 State's tort regimes" in conflict preemption analysis); *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 626 (1973) (in a field preemption case, interference with a single weekly flight was sufficient to warrant invalidation of curfew on aircraft operations). Here, the potential for localized requirements would include not only any of California's own 35 air quality districts,[24] but any similar body anywhere in the country.

SCAQMD's claimed autonomy from EPA approval defies the "well settled" doctrine that "local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 430, 433 (2002) (quoting *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607-08 (1991)). A corollary of that principle has to be that if California is preempted unless it receives EPA approval, so is SCAQMD.[25] To the extent that SCAQMD is a creature of

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[24] *See* http://www.arb.ca.gov/emisinv/maps/statemap/dismap.htm.

[25] For this same reason, SCAQMD cannot rely upon any grant of authority from the State of California because, as an agent of the State of California, any exercise of such delegated authority would merely bring SCAQMD within the ambit of preemption provisions referring to the "State" itself. The 1987 amendment to the California Health & Safety Code cited by the district court as a statutory basis for the Fleet Rules post-dated the creation of SCAQMD by more than a decade, Cal. Health & Safety Code § 40447.5, Cal. Stats. 1987, c. 1301, § 10, and more

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the California legislature and tries to act as the agent of the State, it must (like its principal) obtain the required review approval from EPA. That is the regulatory scheme crafted by Congress in sections 209(a) and (b). Even if the substance of the Fleet Rules were consistent with the substance of federal emissions policy (which as discussed below is not the case), such local regulation is nevertheless pre-empted "if it interferes with the ***methods*** by which the federal statute was designed to reach [its] goal." *Gade*, 505 U.S. at 103 (plurality opinion) (emphasis added) (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)).

Here, SCAQMD has transgressed the clear structure of the Clean Air Act's approval process, and the Fleet Rules therefore are preempted. *Id.* at 100-03 (plurality op.); *id.* at 112-113 (Kennedy, J., concurring in judgment) ("The statute is clear: When a State desires to assume responsibility for an occupational safety and health issue already addressed by the Federal Government, it must submit a state plan. The most reasonable inference from this language is that when a State does not submit and secure approval of a state plan, it may not enforce occupational safety and health standards in that area.").

SCAQMD's defense of the Fleet Rules has no logical boundary under federal law. If SCAQMD can compel fleet owners to select vehicles that use a particular type of fuel, or that meet a particular subset of duly-adopted CARB standards approved by EPA, there is no reason why, as a matter of federal law, it could not compel that every car purchased in the region use alternative fuels, operate on electricity or fuel cells, or any number of *en vogue* potential

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importantly, SCAQMD itself was not created until 1976 when the California legislature passed the Lewis-Presley Air Quality Management Act, Cal. Stats. 1976, c. 324, p. 893, § 5, which was well after Congress had added section 209 to the Clean Air Act.

technologies, such as biomass or solar-powered vehicles. The artifice of regulating purchase rather than sale would make the text of section 209(a) irrelevant and unenforceable, and it would almost certainly invite crusades for automobile design standards to be imposed at the local level

3. The Fleet Rules Frustrate Federal Emissions Policy.

The circumvention of section 209(b) in this case has more than merely procedural importance. Environmental regulation of the automobile is now in its second generation. As standards have been more stringent, emissions reductions have become more costly, because all lower-cost control systems already have been incorporated into new vehicle designs. *See* J. Robert Mondt, CLEANER CARS: THE HISTORY AND TECHNOLOGY OF EMISSION CONTROL SINCE THE 1960S (2000) (nearly ten-fold increase in cost of automotive emission control hardware from 1975 to 1997).

To permit the industry to reduce emissions as cost-effectively as possible, CARB and EPA have used "fleet averaging" regulations. These rules generally allow a manufacturer to reduce emissions on different models to different levels, so long as the average emissions from the manufacturer's fleet as a whole meet a specified performance level, on a sales-weighted basis. *See Motor Vehicle Mfrs. Ass'n v. New York State Dep't of Envtl. Conservation*, 17 F.3d 521, 535 (2d Cir. 1994) ("The crux of the LEV plan is the fleet averaging concept. Fleet averaging is designed to give manufacturers sufficient flexibility to develop varying emissions within their entire fleet to meet the overall goal."). This allows a manufacturer to obtain the greatest reductions from vehicles for which control is relatively less costly, and to avoid having to control other models to the same level. To ensure that there is no environmental degradation, the rules also usually include "caps," which no model in the fleet may exceed.

The hallmark of the fleet averaging rules is flexibility, within the "caps" set by the regulation and subject to meeting the fleetwide performance standard. This is particularly true of the CARB rules that, but for the Fleet Rules, would apply in southern California to the covered fleets. *See, e.g.*, Cal. Code Regs. 13 § 1956.2(a) (2001) (goal of CARB's "Fleet Rule for Transit Agencies" is to require emissions reductions "while also providing flexibility to ... fleet operators to determine their optimal fleet mix.").[26] The wisdom of this approach is borne out by technological advances by manufacturers in recent years—in some instances after SCAQMD adopted the fleet rules—that have demonstrated that buses and other vehicles operating on diesel fuel can achieve very low emission levels, comparable to "alternative fuel" vehicles.[27] According to one transit official, diesel transport vehicles operating on advanced diesel fuel "is the most cost-effective way to reduce emissions."[28]

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[26] *See also* California Air Resources Board, *"LEV II" and "CAP 2000" Amendments to the California Exhaust and Evaporative Emission Standards and Test Procedures for Passenger Cars, Light-Duty Trucks and Medium-Duty Vehicles, and to the Evaporative Emission Requirements for Heavy-Duty Vehicles -- Final Statement of Reasons*, at 36 (1999) (Rules for passenger cars and trucks provide "[c]ompliance flexibility is provided by the ... fleet average requirement in that manufacturers may choose the mix of vehicle categories that best fits their production capabilities."), posted at http://www.arb.ca.gov/reqact/levii/to_oal/leviifso.pdf (last visited Aug. 27, 2003).

[27] *See, e.g.*, California Air Resources Board, Heavy-Duty Emissions Laboratory, Report No. 01-01, at 9 (2001) ("Limited testing at ARB has demonstrated that ... equally sized [diesel] hybrid and [natural gas] offer similar emission level[s]").

[28] *See* Michael Bologna, *Chicago Announces Plan to Convert Buses to Low-Sulfur Diesel Fuel Prior to Deadline*, Daily Environment Rep., Feb. 7, 2003, at A-7 (quoting Frank Kruesi, President of the Chicago Transit Authority).

The Fleet Rules, however, prevent the use of the most cost-effective alternatives, and foreclose the incentive for technological advance, by limiting several important fleet markets to vehicles that operate on natural gas. If the goal is to achieve emissions reductions, this is not the vehicle mix that the market would produce. As a panel of experts studying the trade-offs between vehicles using diesel and natural gas (or "compressed natural gas," abbreviated to "CNG") recently explained:

> Both diesel and CNG are considered robust technologies with reasonably quantified operation and maintenance costs. However, the costs for CNG engine technology are higher. Second, the infrastructure requirements are different. ... CNG infrastructure will require an overhaul after 20-30 years. ... [Diesel] infrastructure can be expected to last decades longer.

FY 2003 Two Hundred Bus Procurement, *Expert Panel Report to the Massachusetts Bay Transport Authority*, at 10-11 (Oct. 2, 2002), http://www.dieselforum.org/resources/MBTA.pdf (last visited Aug. 27, 2003); *see also* Jeffrey Ball, *Fuel for Debate: California's Clean-Air Czar's Shift is New Boost for Diesel*, Wall St. J., Oct. 24, 2002 (Chairman of CARB discussing the advantages of new diesel technology).

The Fleet Rules are a throw-back to earlier times, when regulation was premised on slower technological progress and assumed that "alternative fuels" were inherently cleaner, along with the vehicles that operated on those fuels. The rulemaking record in California even suggests that the Fleet Rules were animated at least in part by an aversion to diesel technology and have been supported by SCAQMD's dissatisfaction with the flexibility allowed in the CARB bus

regulations.[29] The Fleet Rules do not give the covered transit vehicle operators the option to purchase clean diesels. Likewise, even when they do allow some conventionally-fueled vehicle purchases, the Fleet Rules permit the purchase of only a subset of the many different types of vehicles allowed by the CARB rules that are subject to EPA review. In short, many vehicles certified by CARB as meeting all of California's emission requirements are unable to be purchased by fleet operators, because of SCAQMD's Fleet Rules.

II. THE FLEET RULES ARE NOT SAVED BY ANY EXPRESS OR IMPLIED RESERVATION OF AUTHORITY TO LOCAL REGULATION.

The Fleet Rules regulate the purchase (and concomitantly, if the English language is to have any meaning, the "sale") of ***new*** motor vehicles for purposes of emissions control. For this reason, the Fleet Rules are preempted by section 209(a), which covers "new motor vehicles" and preempts any such condition precedent on their "sale." Moreover, for this same reason, SCAQMD has no resort to the savings clause of the Clean Air Act or any implied reservation of authority to local governments that might be presumed.

The Clean Air Act expressly reserves certain local authority over emission control with respect to motor vehicle "use, operation, or movement" in section 209(d):

> Nothing in this part shall preclude or deny to any State or political subdivision thereof the right

[29] *See* Transcript of Public Meeting, California Air Resources Board, March 21, 2002, at 104 (test. of Henry Hogo, SCAQMD Assistant Deputy Executive Officer) ("We are urging [CARB] to eliminate the diesel path from the [CARB] transit bus rule."), transcript at www.arb.ca.gov/board/mt/mt032102.txt (last visited Aug. 27, 2003).

> otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles.

42 U.S.C. § 7543(d). The "natural implication" of such a savings clause is that state actions not covered by the savings clause "are not saved." *Gade*, 505 U.S. at 100 (plurality opinion); *cf. Geier*, 529 U.S. at 868 (interpreting an express preemption clause so that the savings clause would have content). It is a court's "duty 'to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)).

Construing this savings clause in tandem with the preemption clause of section 209(a), the clear line drawn by Congress is easy to discern: the federal government regulates the emissions control requirements for new motor vehicles until they are sold; following sale, the States and their political subdivisions may regulate a vehicle's "use, operation, or movement." Indeed, as EPA has explained and courts have recognized, "the longstanding scheme of motor vehicle emissions control has always permitted the states to adopt in-use regulations—such as carpool lanes, restrictions on car use in downtown areas, and programs to control extended idling of vehicles—that are expressly intended to control emissions." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996).[30]

[30] Even within the ambit of section 209(d), however, states and localities must give a wide berth to the preemption provision in section 209(a). For example, rules cannot be imposed after the sale of vehicles that would have the effect of "circumvent[ing] ... the Clean Air Act and ... defeat[ing] the Congressional purpose" of section 209(a). *Allway Taxi, Inc. v. City of New York*, 340 F. Supp. 1120, 1124 (S.D.N.Y.), *aff'd*, 468 F.2d 624 (2d Cir. 1972).

Such in-use vehicle regulations are common to most metropolitan vehicle owners and their use has in some instances been codified and mandated in various parts of the Clean Air Act. The most important example of the regulation of in-use vehicles is the inspection and maintenance program (I/M) required in ozone nonattainment areas by section 182(b)(4), 42 U.S.C. § 7511a(b)(4).[31] Similar coverage of registered vehicles is found in the gasoline vapor recovery requirements of section 182(b)(3), 42 U.S.C. § 7511a(b)(3), transportation controls imposed by section 182(c)(5), 42 U.S.C. § 7511a(c)(5) and the vehicle mile reduction requirements of section 182(d)(1), 42 U.S.C. § 7511a(d)(1). The conformity provisions of section 176(c), 42 U.S.C. § 7506(c), require transportation plans and programs to be consistent with a transportation emissions budget for the aggregate emissions from motor vehicles in the area covered by the state implementation plan. These programs have characteristics common to all programs used by states to control emissions from in-use vehicles. They apply to all covered vehicles regardless of the emissions measured as part of the engines original certification, and they apply only to vehicles that have been purchased and registered to consumers.[32]

By contrast, the Fleet Rules regulate the sale of new vehicles to privately-owned and privately-operated fleets,

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[31] A more stringent enhanced I/M program is required in serious or worse ozone nonattainment areas by section 182(c)(1), 42 U.S.C. § 7511a(c)(1), and in moderate or worse carbon monoxide nonattainment areas with a design value greater than 12.7 parts per million by section 187(a)(6), 42 U.S.C. § 7512a(a)(6). *See generally* Arnold W. Reitze, Jr., *Federalism and the Inspection and Maintenance Program Under the Clean Air Act*, 27 PAC. L.J. 1461 (1996).

[32] *See generally* Arnold W. Reitze, Jr., *Transportation-Related Pollution and the Clean Air Act's Conformity Requirements*, 13 NAT. RESOURCES & ENV'T 406 (1998).

and therefore are unlike any traditional local regulation of motor vehicles. SCAQMD can point to no in-use motor vehicle control programs regulating the private purchase or sale of any classes of vehicles based on their potential emissions. A local government prohibition on purchasing certified vehicles is wholly inconsistent with existing or traditional in-use programs.

For this reason, the district court and the Ninth Circuit made a fundamental error by invoking a "presumption against preemption" in support of the Fleet Rules. While there is a tradition of the States regulating the use, operation and movement of motor vehicles, there is ***no*** such tradition of States, much less local governments, regulating the performance and design of ***new*** motor vehicles for purposes of emissions control. There is, however, over 35 years of extensive federal regulation of new vehicle emissions. Because the Fleet Rules, which are far from a traditional exercise of local police power, reach into "an area where there has been a history of significant federal presence," an "[a]ssumption of nonpreemption is not triggered." *See United States v. Locke*, 529 U.S. 89, 108 (2000) (internal quotation and citation omitted; *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001) (rejecting presumption against preemption).

The district court and Ninth Circuit framed SCAQMD's police power at a level of generality so high as to be unrebuttable—*i.e.*, protecting health and safety. As the Ninth Circuit would have it, there is a presumption against preemption so long as California, or merely a locality within California, can assert that its regulations are protecting public health and safety. Such a non-textual presumption is virtually limitless. It is also irreconcilable with this Court's precedent.

At such a level of generality, the presumption against preemption surely would have applied in *Locke*, where the

State of Washington was protecting the safety of Puget Sound. The presumption should also have been applied in *Buckman*, where fraud on the Food and Drug Administration would affect health and safety. Yet in both *Locke* and *Buckman*, this Court squarely rejected construing the presumption against preemption so broadly. More significantly, this Court applied no presumption against preemption in *Geier v. American Honda* in holding that state regulation of the safety features of new motor vehicles, in effect a state tort law requirement mandating air bags, was preempted.

The district court and the Ninth Circuit failed to recognize that traditional, local regulation of motor vehicles for purposes of emissions control has been limited to regulation after vehicles have been sold. The regulation of the performance and design of new motor vehicle emissions control has for more than three decades been a ***federal*** program, and until SCAQMD's Fleet Rules, it has never been a local program. There is no textual support in the Clean Air Act for the Fleet Rules, and there is likewise no basis for a non-textual presumption in their favor.

CONCLUSION

Because the Fleet Rules violate the plain text and structure of section 209 of the Clean Air Act, including the Clean Air Act's express preemption clause, and frustrate over 35 years of federal regulatory history, the Fleet Rules are preempted and the decision of the Ninth Circuit should be reversed.

Respectfully submitted,

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August 29, 2003

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

SEPT. 15 1999

Honorable Thomas F. Reilly
Attorney General
Commonwealth of Massachusetts
200 Portland Street
Boston, MA 02114

Dear Attorney General Reilly:

Thank you for your letter dated January 28, 1999, requesting the Agency's opinion regarding questions raised by the court in *American Automobile Manufacturers Association, et al. v. Massachusetts Department of Environmental Protection*, 163 F.3d 74 (1st Cir. 1998). EPA has reviewed this matter with particular concern for ensuring that states are provided continued flexibility in reducing emissions from automobiles and encouraging innovation in automobile design

As explained more thoroughly in the accompanying document, given the unique facts of this case and the language and intent of the Clean Air Act (the Act), EPA believes that Massachusetts's regulations requiring delivery of Zero Emission Vehicles (ZEVs) in Massachusetts from 1998-2000 are not preempted under the Act. Congress

sought to ensure that other states may benefit from steps taken by California to achieve cleaner cars. First, we believe that Massachusetts's ZEV mandate is a standard subject to the identicality restrictions of the Act. That said, given the unique factual circumstances surrounding these MOAs, EPA believes that the provisions of the MOAs requiring the placement of ZEVs in California should as well be considered standards adopted by California for purposes of section 177 and 209(a). Though the MOAs on their face are non-regulatory contractual agreements, the background for the MOAs indicate that they grew directly out of the ZEV regulatory requirements that were in place for the 1998-2002 model years prior to California removing them and were intended to stand in the place of and perform the function of these regulatory requirements, albeit with certain changes (e.g., the number of vehicles affected). Given these facts, EPA believes that state attempts to duplicate the MOAs in regulations should not be preempted by the Act.

EPA does not believe that voluntary agreements between states and manufacturers are generally preempted under section 209. EPA believes that California plays a very important role in promoting the development and sale of clean automotive technology, and that voluntary nonregulatory agreements are a valid tool to implement this role. Such agreements would not [2]normally be treated as standards for purposes of sections 209 and 177. However, under the unique factual circumstances of this case, EPA believes it is appropriate to consider these specific MOAs as standards adopted by California, which Massachusetts may then adopt under section 177.

Thank you again for your letter. If you have any questions regarding the enclosed response, please call me at (202) 260-8040.

Sincerely,

Gary S. Guzy
General Counsel

Robert Perciasepe
Assistant Administrator
Office of Air and Radiation

cc: Julie Becker, Alliance of Automobile Manufacturers
Kathleen C. Walsh, California Air Resources Board

[1] OPINION ON ISSUES RAISED BY AAMA v. MASSACHUSETTS DEP

By letter dated January 28, 1999, Mr. Thomas F. Reilly, the Attorney General of Massachusetts, requested the Agency's opinion regarding questions raised by the U.S. Court of Appeals for the First Circuit in the case *American Automobile Manufacturers Assn v. Massachusetts Dept of Environmental Protection*, 163 F.3d 74 (1st Cir. 1998). That case involves a challenge by automobile manufacturers to Massachusetts's zero emission vehicle (ZEV) production requirement for calendar years 1998-2000. Massachusetts's ZEV mandate for model year 2003 and beyond is not at issue. The Court's opinion, dated December 29, 1998, specifically directed Massachusetts to seek the Agency's opinion on these questions. The Court stayed proceedings in the case for 180 days to allow time for the Agency to provide its opinion. On July 7, 1999, the court, pursuant to a request from EPA, stayed further proceedings until September 15, 1999. If EPA does not issue any opinion by that date, the Court said it would decide the issues without EPA guidance.

The letter requests EPA's opinion regarding whether Massachusetts's ZEV production requirement is preempted under the Clean Air Act. The ZEV requirement mandates that the seven largest automobile manufacturers produce for sale specific numbers of ZEVs in the 1998-2000 calendar years. The Court ruled that EPA has primary jurisdiction over the issues,[1] which arise under sections 209 and 177 of

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[1] Primary jurisdiction is "a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. It requires the court to enable a 'referral' to the agency, staying further proceedings so as to give the parties reasonable opportunity to seek an administrative ruling." *Id.* at 81, quoting *Reiter v Cooper*, 507 U.S. 258, 268 113 S. Ct. 1213 (1993).

the Clean Air Act. The Court also indicated that it expected to give deference to EPA's view on these issues.

EPA believes that, given the text and the underlying goals of the statute and in light of the unique facts of the case, Massachusetts's ZEV requirement should not be preempted. EPA believes that this interpretation ensures that, under similar circumstances, states will be able to implement the emission control standards in effect in California, as contemplated by section 177 of the Act.

I. Background

A. Statutory Provisions

The Clean Air Act generally prevents states from enacting their own emission control programs for new motor vehicles. Section 209(a) of the Clean Air Act (CAA or the Act), 42 U.S.C. § 7543(a), prohibits states from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles..." Also, "[n]o State shall require certification, inspection, or any approval related to the control of emissions from any new motor [2] vehicle ... as conditions precedent to the initial sale, titling ... or registration of such motor vehicle..."

There are, however, two exceptions to this general rule. First, when Congress enacted the section 209(a) prohibition in 1967, it recognized that California has special air quality needs justifying a new motor vehicle emission control program more stringent than the federal program, and that California has been the trailblazer in requiring stringent emission controls for motor vehicles. S. Rep. No. 403, 90th Cong., 1st Sess. 33 (1967). Therefore, Congress at the same time enacted section 209(b), which allows California, pursuant to a waiver granted by EPA, to enact its own motor vehicle program, as long as it is at least as stringent, in the aggregate, as the federal program and is technologically feasible given leadtime and cost.

Second, in 1977, Congress enacted CAA section 177, 42 U.S.C. § 7507, which allows other states to enact regulations controlling emissions from new motor vehicles, but only if the state standards are identical to California's standards controlling motor vehicle emissions. This provision allows other states to control emissions from new motor vehicles without requiring motor vehicle manufacturers to comply with a patchwork of different state standards. See *Motor Vehicle Manufacturers Ass'n v. New York*; 17 F. 3d 521, 527-28 (2nd Cir. 1994). Under section 177, as amended in 1990:

> Notwithstanding section 209(a), any State which has plan provisions approved under this part may adopt and enforce for any model year standards relating to control of emissions from ~~new motor~~ vehicles . . . if
>
> (1) such standards are identical to the California standards for which a waiver has been granted for such model year, and
>
> (2) California and such State adopt such standards at least two years before commencement of such model year .... Nothing in this section or in title II of this Act shall be construed as authorizing any such State to prohibit or limit, directly or indirectly, the manufacture or sale of a new motor vehicle. . . that is certified in California as meeting California standards, or to take any action of any kind to create, or have the effect of creating, a motor vehicle . . . different than a motor vehicle . . . certified in California under California standards (a "third vehicle") or otherwise create such a "third vehicle."

B. Regulatory Background

In 1990, California adopted regulations establishing a Low Emission Vehicle (LEV) program, which requires automobile manufacturers ("manufacturers") to meet progressively more stringent automobile standards beginning in model year 1994. The LEV program provides that

manufacturers must build vehicles that meet one of several sets of standards (i.e. "Tier 1 vehicles," Transitional Low Emission Vehicles (TLEVs), Low Emission Vehicles (LEVs), Ultra Low Emission Vehicles (ULEVs) and Zero Emission Vehicles (ZEVs)) and that manufacturers' fleets for each model year must meet a fleetwide non-methane organic gases (NMOG) emission [3] average, which becomes progressively more stringent each year. The LEV program also initially included a provision requiring that, beginning in model year 1998, two percent of all automobiles offered for sale by manufacturers in any model year must be ZEVs. This percentage increased to five percent in model year 2001 and to ten percent in model year 2003. The only vehicles that can meet this requirement using current technology are electric vehicles. In January, 1993, EPA granted California's request for a waiver of preemption under CAA section 209(b) for its LEV program, including the ZEV provisions,

Following California's adoption of its LEV program, New York and Massachusetts adopted state motor vehicle requirements that mirrored the California LEV program, including the ZEV provisions, under CAA section 177. Manufacturers sought judicial review of the New York and Massachusetts requirements, claiming the regulations were preempted under the Clean Air Act. Manufacturers argued, among other things, that the states' adoption of California's ZEV mandate violated: 1) section 177's requirement that state regulations not limit the sale of California vehicles; and 2) section 177's "third vehicle prohibition." In both cases, the courts found that the state programs were not preempted. *American Automobile Manufacturers Assn v. Greenbaum*, No. 93-10799-MA (D. Mass. Oct. 27, 1993),[2] *aff'd* 31 F. 2d

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[2] The court in the Massachusetts case did not make a final ruling, but denied manufacturers' motion for a preliminary injunction on Counts 1 through 4 of their complaint, which are not directly related to

(Continued...)

18 (1st Cir. 1994); *Motor Vehicle Manufacturers Assn v. New York*, 17 F. 3d 521 (2nd Cir. 1994); *Motor Vehicle Manufacturers Assn v. New York*, 79 F. 3d 1298 (2nd Cir. 1996). The Court in the New York case dealt specifically with the manufacturers' claims against New York's ZEV mandate, and found that the New York's ZEV production requirement did not violate the "sales limitation" or "third vehicle" prohibitions of section 177 because New York's ZEV requirement was identical to California's ZEV requirement. *Motor Vehicle Manufacturers Ass'n v. New York*, 17 F. 3d at 536-538. EPA filed amicus briefs defending the New York and Massachusetts programs in these cases.

However, in 1997, California deleted the ZEV sales requirement from its regulations for all model years prior to 2003. At approximately the same time, California signed seven Memoranda of Agreement (MOAs) with the largest manufacturers: In the MOAs, the manufacturers agreed to a demonstration program under which manufacturers would place in California substantially fewer numbers of ZEVs from calendar years 1998 to 2000 than were required under the initial regulations. The manufacturers agreed to place a combined total of 750 ZEVs in California in 1998 and a combined total of 1500 ZEVs in California in both 1999 and 2000. No ZEVs were required in calendar years 2001 and 2002. California agreed in the MOAs to provide a certain amount of infrastructure and support to facilitate the use of ZEVs. Manufacturers also agreed to provide LEVs nationwide under the National Low Emission Vehicle (NLEV) program. Manufacturers are subject to potentially severe penalties, through liquidated damages, if they fail to

manufacturers' issues regarding the ZEV mandate, based on the "strong showing on the merits" by Massachusetts. *Id*, slip op. at 26.

comply with the MOA. For example, a complete failure to implement the [4] MOA could lead to a penalty equal to a manufacturer's pro-rata share of $100,000,000.[3] The determination of whether a breach has occurred is determined initially by the Executive Officer for California's Air Resources Board (CARE), with *de novo* review by the Board, and then *de novo* review in state court. There are no similar provisions for a breach by California. These MOAs were not codified into California's regulations and were not submitted to EPA for a waiver.

Following California's deletion of its ZEV mandate between 1998 and 2002, Massachusetts revised its own ZEV requirements for those years to require that manufacturers deliver in Massachusetts the number of ZEVs each manufacturer agreed to "place" in California under the seven MOAs. Massachusetts also enacted certain reporting requirements related to placement of ZEVs in Massachusetts.[4]

C. Litigation

AAMA sued Massachusetts in the Federal District Court in Massachusetts, claiming that Massachusetts's ZEV requirement is an emission standard prohibited by CAA

3 Each manufacturer's pro-rata share, based on historical share of the California market, is defined in the MOAs.

4 New York, on the other hand, did not revise its ZEV mandate, continuing to require two percent of manufacturers' vehicles to be ZEVs in the 1998-2000 model years. Manufacturers brought a new challenge to New York's ZEV requirement based on the fact that it was no longer identical to California's requirement and therefore violated section 177. The Second Circuit found that the New York ZEV mandate was preempted. *American Automobile Manufacturers Ass'n v. Cahill*, 152 F. 3d 196 (2nd Cir. 1998) ("Cahill").

section 209(a) and is not permitted by CAA section 177. AAMA claims that the California MOAs are not "standards" as that term is used in sections 177 and 209 of the CAA, but rather contractual agreements. AAMA claims that since Massachusetts's ZEV production requirement is a state standard prohibited under section 209(a) and since it is not identical to any California standard, it is not authorized by, section 177. AAMA also claims that even if the MOAs are standards, California has never asked for or received a waiver for them, so Massachusetts's ZEV mandate is not identical to any California standard for which a waiver had been granted. Finally, AAMA claims that the Massachusetts sales requirement is not identical to the MOAs because it did not contain the reciprocal obligations that California had obliged itself to meet under the MOAs, and Massachusetts had not changed the sales requirements in the MOAs to take account of the smaller number of vehicles sold in Massachusetts compared to California.

Massachusetts claims that its ZEV mandate is not preempted because it is not a "standard" under section 177 but is instead an "enforcement mechanism" related to the LEV standards, which, Massachusetts claims, need not be identical to California standards under section 177. Alternately, Massachusetts claims that if a ZEV mandate is a standard, it is a standard whether it is in regulations, as in Massachusetts, or in MOAs, as in California. Thus, California's ZEV [5] requirements would also be standards and Massachusetts's ZEV regulations would be identical to them. Massachusetts claims that its failure to incorporate California's obligations do not render its standards non-identical because the automobile manufacturers' obligations under the MOAs are not dependent on California's obligations. Moreover, Massachusetts claims that California does not need to receive a separate waiver from EPA for the MOAs because they are within the scope of the previous waiver granted to California for its LEV program.

1. The Decision of the District Court

The District Court found that Massachusetts's ZEV mandate was preempted by the CAA, because it "does not adopt a standard identical to California law, or enforce such a standard." *American Automobile Manufacturers Ass 'n v. Massachusetts Dept of Environmental Protection*, 998 F. Supp. 10, 18 (D. Mass. 1997) ("*AAMA I*"). The Court found that California's MOAs were not standards because they were voluntary agreements. The Court stated that Massachusetts's mandate violates the "identicality" provision because it "adopts or enforces" a standard in 1998 (i.e. the production of ZEVs) that California does not require until 2003. Though the Court did not specifically decide whether the ZEV mandate is itself a standard, the court found that the Massachusetts ZEV mandate was preempted. Massachusetts appealed.

2. The Decision of the Court of Appeals

The Court of Appeals for the First Circuit found that many of the issues raised by the case, including the issue of whether the ZEV mandate and the MOAs are "standards," are within EPA's primary jurisdiction and would benefit from EPA's "deep familiarity with the CAA and the public policy considerations that underlie these statutory provisions." *American Automobile Manufacturers Ass'n v. Massachusetts Dept of Environmental Protection*, 163 F. 3 d 74, 83 (1st Cir. 1998) ("*AAMA II*").

The court further determined that the statutory interpretations of these provisions "lend themselves to competing interpretations ... and that both are sufficiently reasonable that we would be bound by *Chevron* to defer to the EPA's choice of either one." *Id.*, at 83.

The court gave Massachusetts 180 days to obtain a ruling from the EPA on these issues, providing a deadline of June 27, 1999. The court said it would decide the issues without

EPA's guidance if EPA did not provide its opinion by that date.[5]

D. Administrative Proceedings

On March 26, 1999, EPA published a notice in the Federal Register requesting comment from the public on the letter from the Massachusetts Attorney General. The period for comment [6] ended on April 26, 1999. EPA received detailed comments from Massachusetts and New York supporting Massachusetts's ZEV requirements and detailed comments from California and the Alliance of Automobile Manufacturers/Association of International Automobile Manufacturers against the ZEV requirements. EPA also received several more summary comments from other parties either supporting Massachusetts or the automobile manufacturers.

On June 24, 1999, in a letter from Robert Perciasepe, Assistant Administrator for Air and Radiation to Attorney General Thomas F. Reilly, EPA notified Massachusetts that it was having difficulty meeting the deadline of June 27, 1999 set by the court and anticipated issuing its response by early September. EPA requested that Massachusetts inform the court and inquire whether answering the court's questions in this time frame is acceptable. Massachusetts provided this letter to the court. On July 7. 1999, the court granted the request for additional time, providing EPA until September 15, 1999 to respond to the court's questions.

II. Analysis

There is a two-step analysis to determine whether the Massachusetts ZEV mandate is preempted by the Clean Air

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5 As earlier noted, pursuant to EPA request, the court has now extended the deadline to September 15, 1999.

Act. The first issue is whether the regulation is, as a preliminary matter, prohibited under section 209(a) of the Act. If the regulation would be so prohibited, the next issue is whether the provisions of section 177 nonetheless permit the regulation. With regard to Massachusetts's ZEV mandate, the court answered the first issue and therefore did not refer it to EPA. Thus this document focuses principally on the second issue.

A. Does Section 209(a) Preempt the Massachusetts ZEV Mandate?

The First Circuit ruled that whether the ZEV sales requirement is a standard or an enforcement procedure, it is preempted by section 209(a). This is based on the clear language of section 209(a), which forbids states from "adopt[ing] or attempt[ing] to enforce any standard." Thus, whether the ZEV mandate is itself a standard, as manufacturers claim, or is merely a mechanism for enforcing the other LEV standards, as Massachusetts claims, it is subject to the preemption provisions of section 209(a). *AAMA II* at 83. EPA agrees with the court's reasoning on this issue.

B. Does Section 177 Override Section 209's Preemption as to the Massachusetts ZEV Mandate?

State measures that would otherwise be preempted under section 209 are nevertheless permitted under section 177 if state standards for a particular model year are identical to "California standards for which a waiver has been granted for such model year" and if the standards were adopted at least two years before the model year begins. However, state regulations cannot "limit ... the manufacture or sale of a new motor vehicle ... that is certified in California" or "have the effect of creating, a motor vehicle ... different than a motor vehicle ... certified in California under California standards (a

'third vehicle') or otherwise create such a [7] third vehicle." For purposes of this analysis, the key issue regarding Massachusetts's ZEV mandate is whether the mandate is subject to the "identicality" criterion and, if so, whether it meets that criterion.[6]

1. Is the ZEV mandate subject to the identicality provision?

The first question is whether Massachusetts's mandate is subject to the identicality requirements of section 177. Massachusetts argues that the ZEV mandate is not subject to the identicality requirement because the identicality requirement applies only to standards and the ZEV mandate is not a standard, but an enforcement procedure. The manufacturers, on the other hand, argue that the ZEV mandate is a standard, and thus is covered by the identicality requirement. They also argue that the identicality requirement applies in any case to enforcement procedures, but they claim in their comments that EPA need not resolve that issue in this proceeding.

Is the Massachusetts ZEV Mandate a Standard?

i. Comments

Massachusetts argues in its comments that the ZEV mandate is not a standard relating to the control of emissions from new motor vehicles. It claims that the ZEV mandate has only a negligible impact on emissions. The purpose of the mandate is not to reduce emissions directly, but to create the conditions necessary for the implementation of the ZEV mandate in 2003. Massachusetts also states that the ZEV mandate is not a "quantitative standard" and should not be

6 The other issues were not raised in the litigation.

considered an emissions standard, citing *Adamo Wrecking Co. v. U.S.*, 434 U.S. 275, 285-89 (1978).[7] Massachusetts's comments are echoed by New York. New York claims that the ZEV mandate does not rise to the level of a standard but instead helps enforce compliance with the other standards in the LEV program. New York cites *Motor and Equipment Manufacturers Association v. EPA*, 627 F. 2d 1095 (D.C. Cir. 1979) ("*MEMA*"). In that case, the D.C. Circuit describes standards as regulations involving "quantitative levels of emissions" and measures that directly address air quality. *Id.*, at 1112-1113. New York claims that the ZEV requirement does not directly address air quality.

Automobile manufacturers argue that the ZEV mandate is a standard. They note that the 2nd Circuit has already found New York's ZEV mandate to be a standard. Further, they claim that the MEMA decision supports their argument because the ZEV mandate does affect emissions, in that it reduces levels of nitrogen oxides (NOx), carbon monoxide (CO), and evaporative [8] hydrocarbons (HCs). The manufacturers state that EPA has previously recognized that the ZEV mandate imposes direct air quality controls that are separate and distinct from the NMOG fleet average. 59 Fed. Reg. at 48,592 (Sept. 22, 1994) (Supplemental Notice of Proposed Rulemaking, Ozone Transport Commission LEV Program).

The manufacturers argue that the most simple standard requires 100% compliance, but a standard is no less a standard merely because it requires only a portion of the fleet to comply. They note that section 202(g) of the Act clearly

7 The court in that case found that the term "emission standard" under section 112 of the Clean Air Act, as in effect prior to 1977, was distinguishable from "design, equipment, work practice or operational standard(s)." *Id.*

states that the Tier I "standards" include both the emission levels and the phase-in associated with those levels.

Further, the manufacturers claim that as a practical matter, if state sales requirements need not be identical to California sales requirements, EPA will be giving other states more power than California, because they could then freely decide the number of clean vehicles sold in the state without having to get any approval from EPA regarding stringency or consistency with section 202(a), which are criteria that California must meet under section 209(b). According to the manufacturers, this is contrary to the intent of Congress in enacting section 177, which was to allow states to get needed emission reductions while not causing undue burden on manufacturers, which would occur if each state were allowed to pick its own production requirements. Manufacturers claim that allowing states to adopt their own ZEV mandates could create the "anarchic patchwork" that concerned Congress and the court in *MEMA*. *Id.*, at 1109.

On this issue, the state of California provided comments similar to those of the manufacturers.

ii. Analysis

EPA believes that the most appropriate interpretation of the language and policy goals of the statute is that Massachusetts's ZEV mandate is a standard for purposes of sections 171 and 209.

The language of the Act contemplates that a standard, for the purposes of sections 177 and 209, would include the requirement to produce a certain number or percentage of vehicles ("production requirement") to meet a numerical emissions limitation. The Clean Air Act does not define the term "standard relating to the control of emissions from new motor vehicles," as found in sections 177 and 209. However, in CAA section 202, which provides EPA's authority for promulgating standards applicable to emissions from motor

vehicles, the terms "standard" clearly encompasses both a numerical emission limitation and the number of vehicles that are subject to that limitation. For example, section 202(g), 42 U.S.C. § 7521(g), specifically requires EPA to promulgate "standards" that "provide that emissions from a percentage of each manufacturer's sales volume ... shall comply with the levels specified." Similarly, many current EPA motor vehicle regulations contain phase-in requirements or fleet averages, which EPA has promulgated [9] under its authority to issue standards under CAA section 202.[8] Part and parcel of the standard-setting authority is the authority to specify the number of vehicles produced by a manufacturer that are subject to particular emission limits. The flexibility to promulgate phase-ins, fleet standards, or a particular "mix" of standards in a particular year is an important aspect of EPA's standard-setting authority. There is little reason to believe that Congress intended a substantially different interpretation of "standard" under section 209 than that under section 202.

A numerical emission limit, by itself has no real meaning absent a tie to the kind and number of motor vehicles to which the limit applies. Setting the link between the emission limit and the applicability of the limit to a particular

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8 Percentage production requirements are similar to fleet average emission standards. Such fleetwide standards can easily be converted into percentage requirements, and vice versa. For example, regulations that require 40% of vehicles to meet a 1 gram standard and the rest to meet a 2 gram standard could easily be rewritten as a fleetwide average of 1.6 grams, with two sets of certification standards. EPA has already found that fleetwide average emission standards are "standards." See 62 Fed Reg. 31192, 31222 (June 6, 1997) ("the Agency may promulgate standards, such as fleet averages [and] phase-ins, that are fulfilled through compliance over an entire fleet, or a portion thereof, rather than through compliance by individual vehicles.")

number of vehicles is an inherent part of the standard setting process. This process specifies the level of emissions or emissions reductions that is expected from a manufacturer and establishes the amount of emissions reductions expected from the standard setting process. If a production requirement, such as the ZEV mandate, is not considered part of the standard itself, then compliance with a standard (i.e., the numerical emission limitation) would be disconnected from the obligation to build cars to meet the standard. This could lead to emission standards that have no air quality benefit at all.

This combination of an emissions limit and a requirement to produce vehicles meeting that limit is key to evaluating certain central issues in standard setting. For example, consideration of cost, availability of technology, and resulting emissions reductions all require that both the numerical limit and the applicability of the limit be considered. EPA's obligation to consider these factors in setting emissions standards, and in considering California's requests for waivers from preemption under section 209(b), indicates that the requirement to produce vehicles is in fact part of the emission standard. See sections 202(a), 209(b), 213(a)(3), (4) and (5). For example, under section 209(b), EPA must determine whether California is arbitrary in its determination that its standards are "in the aggregate, at least as protective of public health and welfare as applicable Federal standards." It would be difficult for EPA to make such a determination if it did not review the obligation of manufacturers to build their vehicles, or a portion of their vehicles, to meet California's standards.

Enforcement provisions, by contrast, are designed not to provide a certain level of emission reductions directly, but instead to ensure that the level of emissions reductions expected from the standards actually occur. See *Cahill*, 152 F. 3d at 200. If all requirements considered to be enforcement measures were deleted, and the manufacturers

still complied with the [10] requirements considered to be standards, emissions would still be reduced to the levels expected when the standard was set. Since production requirements directly affect the emission reductions from a regulation, rather than ensuring that such reductions occur, they should be seen as an inherent part of motor vehicle emission standards, not enforcement provisions.

The policies underlying section 177 also indicate that the ZEV mandate should be considered a standard, because if production requirements are not standards, then other states could enact production requirements that were different from California's requirements substantially undercutting Congress's intent under section 177 to prevent manufacturers from being required to build different vehicles for various state programs. Section 177 was enacted to allow states to require emission reductions from new motor vehicles without causing vehicle manufacturers the undue burden of having to meet different standards in different states.[9] California was to be the model for all other states to follow. EPA could be assured that state regulations were technologically feasible and at least as stringent as federal regulations because EPA would have already found California's regulations to meet those requirements under section 209(b).

However, if other states are not limited to the production mandates in California's regulations, this attachment to California's program would be diminished. California would no longer be the model for state programs. Further, EPA's evaluation of California's program under section 209(b)

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9 See, e.g., 123 Cong. Rec. 17,765, 17,766 (June 7, 1977) (Statement of Sen. Anderson regarding section later adopted) ("The language in my amendment... would allow only the present two-car strategy to extend to other States. ... No additional certification of different kinds of cars will be required and no new standards will be created.")

might no longer be relevant for programs enacted by other states. Since such states are not subject to EPA review under section 177 or 209, states would be free to create their own programs without any oversight from EPA. Such states would therefore have substantially more freedom than even California to design their own motor vehicle programs. Manufacturers could be forced to build different numbers or percentages of vehicles to meet the requirements of different states. For example, a state could turn a relatively slow phase-in of a new standard under California's requirements into an immediate requirement for 100% compliance. Because EPA's review of California's motor vehicle program under section 209(b) presumed California's slow phase-in, the other state's revised program with an immediate 100% requirement would have escaped all EPA review, which may lead to the enactment of an infeasible requirement in the other state.

Massachusetts's argument regarding the negligible emissions impact of the ZEV mandate is unpersuasive. The small effect on emissions is related only to the number of ZEVs being required not to the issue of whether the mandate is a standard. If a mandate requiring production of a small number of ZEVs is not a standard, it is difficult to see why a mandate for a larger number would be a standard. They are the same type of regulation. In any case, the ZEV mandate would clearly have an impact, however small, on emissions. In particular, emissions [11] from those vehicles specifically subject to the mandate would be substantially affected by the mandate.

In fact, Massachusetts's argument would allow a state to impose the burden on industry that section 177 seeks to avoid, while achieving little or none of the emissions benefits contemplated by section 177. Massachusetts's ZEV mandate requires ZEVs to be delivered for sale in Massachusetts. But for that mandate, manufacturers would not have to produce any ZEV; for sale in Massachusetts from 1998-2000. If the

Massachusetts ZEV requirement is different from California's requirement, manufacturers would indeed be subject to different production requirements in different states. This could impose the kind of burden on industry that section 177 was designed to prevent. However, Massachusetts claims that the negligible emissions benefits of the mandate should excuse Massachusetts from the identicality requirement. Yet the purpose of section 177 is to allow states other than California to obtain needed emission reductions from vehicles.

Finding that the Massachusetts ZEV mandate is a standard is also consistent with the view of the Second Circuit, which reviewed virtually the same issue in *Cahill*. In that case, the court ruled that New York's ZEV mandate was an emission standard. The court ruled that standards are "regulatory measures intended to lower the level of auto emissions, while 'enforcement mechanisms' describe regulatory devices intended to ensure standards are effective. ... [T]he ZEV sales requirement must be considered a standard 'relating to the control of emissions.' ZEV, after all, stands for 'zero-emission vehicle,' and a requirement that a particular percentage of vehicle sales be ZEVs has no purpose other than to effect a general reduction in emissions." *Id.* at 200.[10]

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10 The two cases cited by Massachusetts and New York are not helpful to them. The *MEMA* case concerned an in-use compliance provision that clearly was an enforcement treasure. The opinion contains dicta that are helpful to either argument. Even assuming the *Adamo* case was ever relevant to the determination of standard under Title II (as the *MEMA* court suggests, 627 F.2d at 1112 n.35, the word "standard" as used in Title II is distinguishable from its use in the rest of the Act), it is no longer because Congress has legislatively overruled *Adamo* twice, increasing the scope of the term "emission standard" under section 112, and the rest of the Act, to include the work practice requirements disallowed in *Adamo*. Compare section

(Continued...)

EPA therefore believes that the Massachusetts ZEV mandate is a standard for purposes of sections 177 and 209 and is subject to the "identicality provision" in section 177.[11] [12]

302(k), 42 U.S.C. §7602(k) as revised in 1990, to the same section prior to 1990. See also CAA section 112(e)(5), 42 U.S.C. § 7412(e)(5), as in effect prior to 1990, which was enacted in 1979 as a direct response to *Adamo*, 92 Stat. 3443, 3457.

11 The manufacturers also argue that even if the ZEV mandate is not a standard, regulations other than standards are subject to the identicality requirement under section 177. This issue is relevant not only for evaluation of the ZEV production mandate, but for evaluation of Massachusetts's ZEV reporting requirements. In the context of EPA's conclusion with regard to the proper scope of "standards" under sections 177 and 209, EPA disagrees with manufacturers' argument that requirements other than standards are subject to the identicality requirement. In enacting sections 209 and 177, Congress was careful in its use of the terms "standards" and "accompanying enforcement procedures." See *MEMA*, 627 F. 2d at 1113. Within section 209, subsections (a), (b)(1)(C) and (e)(2)(B) all specifically differentiate between standards and other types of requirements, which would be unnecessary if standards were meant to include other types of requirements. It is clear that Congress understood the difference between these terms when it promulgated section 177. Therefore, the fact that the identicality provision applies on its face only to standards is strong evidence that requirements other than standards are not covered by that requirement. The Second Circuit reached this conclusion in *Motor Vehicle Manufacturers Ass'n v. New York*; 79 F. 3d 1298, 1305-06 (2nd Cir. 1996). The history of section 177 also supports this analysis. In 1990, Congress revised section 177 to prevent states from taking any action to create a "third vehicle." As the Second Circuit recognized in *Motor Vehicle Manufacturers Ass'n v New York*, 17 F. 3d 521, 537 (2nd Cir. 1994), a clear purpose of this "third vehicle" prohibition was to prevent states from administering and enforcing standards in such a manner as to effectively require a third vehicle. If the identicality requirement applied to enforcement procedures, the "third vehicle prohibition" would be unnecessary, as identical

(Continued...)

2. Is the ZEV mandate identical to a California standard that has received a waiver for the same model years?

(a) Are California's MOAs standards under sections 209 and 177?

i. Comments

Massachusetts argues that California's MOAs are regulations in all but name, and thus are standards under section 209(a) regardless of form. According to Massachusetts, the term "standards" can mean regulatory standards or contractual standards. Massachusetts states that the MOAs are one-sided and manufacturers pay a heavy penalty (enforceable liquidated damages) for failure to deliver, which indicates their similarity to regulatory standards. Massachusetts claims that the MOAs are an attempt by auto manufacturers to avoid regulation by states other than California. Massachusetts claims that allowing this type of contractual arrangement would [13] give California unreviewable discretion to decide the scope of

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enforcement procedures could never create a third vehicle. Moreover, the legislative history of this 1990 amendment makes clear that Congress intended states to retain their ability to enforce California's standards through regulations that need not meet the identicality requirements of section 177. Statement of Sen. Baucus, 136 Cong. Rec. S16976 (Oct. 27, 1990) (noting that Congress reaffirmed the pre-existing EPA position that state enforcement procedures need not be identical to California's). Moreover, as noted by the Second Circuit, "it is understandable that Congress did not limit states in this way -- enforcement techniques will necessarily vary from state to state." *Motor Vehicle Manufacturers Assn v. New York*, 79 F. 3d at 1306.

other states' programs and urges EPA to close the door on this device to prevent attacks on section 177.

New York echoes Massachusetts's arguments, saying that the MOAs undercut Congress's framework under section 177 and saying that California has grossly abused its powers.

California and the automobile manufacturers argue that the MOAs are not standards and should not be subject to preemption under section 209. They argue that Clean Air Act section 302(k) defines an emission standard as a "requirement established" by EPA or a state, thus implying unilateral regulatory action, not contractual action. Section 209 speaks of "adopting" a standard, which also implies regulatory action, not contractual action.

California and the manufacturers note that the MOAs are contracts and were not adopted by regulation. They argue that federal preemption of state action generally, and the provisions of section 209 in particular, apply only to regulations, and do not preempt a state's ability to contract. See *Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts*, 507 U. S. 218, 226-27 (1993) and *American Airlines Inc. v. Wolens*, 513 U.S. 219, 229 (1995). These commenters claim that the case cited by the 1st Circuit, *Wisconsin Dep't of Industry v. Gould*, 475 U.S. 282 (1986) is not on point because the Supreme Court in that case invalidated a state statute, not a contract.

California and the manufacturers further argue that Congress never contemplated that a voluntary agreement between California and a manufacturer could be transformed into a binding commitment unilaterally imposed by another state. Section 209(a) was, they argue, designed to protect manufacturers from being forced into a patchwork of regulations, not to prevent voluntary actions. California and other states have previously entered into settlement agreements and other voluntary agreements similar to the

MOAs. According to California and the manufacturers, a decision that California's MOAs are covered by section 209 would preempt such voluntary agreements by all states.

California notes that EPA is not precluded from reviewing California's MOAs under the criteria of section 209(b) if the existence o f the MOAs calls California's protectiveness finding into question. California also notes that Congress specifically gave it extra powers because of its unique air quality problems and its trailblazing in the automobile emission control arena. California claims that the spurring of technological development is one of its most important functions in the Congressional scheme and will ultimately help the whole country. According to California, the MOAs, which create demonstration programs for advanced technology ZEVs, are consistent with Congress's intent. The limited MOAs are, in California's view, the best way to introduce these ZEVs. The automobile manufacturers claim that they need to focus their development efforts on California projects without having to meet widespread requirements in other states before they are ready for commercial distribution. [14]

ii. Analysis

Given the unique factual circumstances surrounding these MOAs, EPA believes that the provisions of the MOAs requiring the placement of ZEVs in California should be considered standards adopted by California for purposes of section 177 and 209(a). Though the MOAs on their face are non-regulatory contractual agreements, the background for the MOAs indicate that they grew directly out of the ZEV regulatory requirements that were in place for the 1998-2002 model years prior to California removing them and were intended to stand in the place of and perform the function of these regulatory requirements, albeit with certain changes (e.g., the number of vehicles affected). Moreover, it appears from the record that the MOAs were developed as

contractual agreements, rather than regulatory standards, with an intention from the manufacturers' standpoint to limit the ability of other states to adopt the new provisions, thus effectively negating the will of Congress in enacting section 177.

EPA believes that in general, provisions in voluntary agreements ordinarily should not be considered "standards" subject to section 209(a). The language of the statute appears to indicate that provisions in voluntary agreements should not generally be considered standards under section 209. The legislative history of section 209 also appears to indicate that the prohibition in section 209 is meant to apply to state mandates (regulations and laws), not voluntary agreements. *See discussion, id.* at 23.

Moreover, if production requirements in voluntary agreements were generally preempted, then every such requirement in agreements in every state would be preempted. For example, any contractual agreement between a state and manufacturers to sell low emission vehicles in the state would be preempted. Since only California could overcome preemption through section 209(b), such agreements by all other states would violate the Clean Air Act, unless the relevant provisions were identical to those made by California. EPA believes it would be an inappropriate interpretation of section 209(a) to treat all such agreements as prohibited. Today's decision is limited to the unique circumstances of this case, and is not intended in any way to extend the scope of section 209 beyond regulatory requirements and the specific kind of circumstances considered here.

Massachusetts, however, does not assert that all types of agreements are *per se* preempted under section 209. Massachusetts instead argues that the California MOAs are really regulations in substance, and therefore are subject to section 209 and contain standards that can be copied by other

states. California, on the other hand, emphasizes the "demonstration" aspects of the MOAs, and the fact that many provisions in the MOAs, like California's agreement to facilitate infrastructure, are not elements that would normally appear in state regulations.

EPA believes that the MOAs should be treated as standards adopted by California, based on the circumstances presented in this case. A binding regulatory requirement has in effect been replaced by a binding contractual arrangement. The contractual provisions address the same central issue of ZEV production requirements. In this case, the record indicates that the parties [15] intended these provisions to perform the function and take the place of regulatory revisions, with the attendant benefits to the parties of such revisions. Absent the more stringent regulatory requirements they replaced, the agreements arguably would not have been entered into. Moreover, just as the mere fact that the Massachusetts program involves only a small number of vehicles is not relevant" to a determination whether that program is a "standard" under the Act, the fact that California asserts that it has created only a technology demonstration program is not relevant to a determination under section 209(a) regarding whether the program creates a standard.

The potentially severe liquidated damages resulting from a manufacturer's failure to comply with the MOAs, the manner in which such liquidated damages are decided (initial determination from the CARB Executive Officer, and *de novo* review by the Board, followed by *de novo* court review) and the lack of similar provisions in case of breach by California, perform the function of assessment of civil penalties for breach of a regulatory requirement. These contractual enforcement provisions provide an assurance to California comparable to the preexisting regulatory requirements. In addition, the MOAs were also entered into with an intention by the manufacturers to limit the ability of

other states to adopt the new provisions under section 177. *AAMA II*, Brief for the Appellant, pp. 30-32; Letter from Kathleen Walsh, General Counsel, California Air Resources Board, to Jane Armstrong, Director, EPA Vehicle Programs and Compliance Division, dated May 16, 1997 (Docket No. A-99-08, Document No. II-D-04). These specific MOAs function as, and should be treated for the purposes of sections 209 and 177 as, standards in the nature of revisions to the preexisting regulatory ZEV mandate for the 1998-2002 time frame.

EPA is also concerned that not treating these MOAs as standards could encourage California and manufacturers to implement many regulatory measures using this approach, thereby both preventing other states from implementing such measures and escaping EPA review under section 209. EPA agrees with California that the latter concern is tempered because California will ultimately need to show that its motor vehicle regulatory program (i.e., those measures that are in California's regulations) is in the aggregate as stringent as federal measures; however, even within that framework, California and manufacturers would have considerable ability to avoid the prescriptions of sections 209 and 177 through voluntary agreements.

Many of the arguments raised by California and the automobile manufacturers relate to the argument that voluntary arrangements are generally not covered by sections 209 and 177. As indicated above, EPA agrees with California and the manufacturers that generally such arrangements would not be covered by those sections. However, the unique circumstances of these MOAs clearly indicate that despite the "form" of the documents as contracts, the measures should be treated as standards adopted by California for the purposes of sections 177 and 209. Moreover, the argument that this result is contrary to the intent of Congress is not persuasive, given that Congress clearly intended that other states should have the right to

copy California's motor vehicle standards, which is what Massachusetts intended.

[16] Thus, given the facts of this case, for purposes of CAA sections 209 and 177, the MOAs should be considered standards adopted by California. Thus, Massachusetts may use their existence to justify their ZEV standards under section 177.

(b) Are Massachusetts Standards Identical to California's

i. Comments

Manufacturers claim that California bound itself to infrastructure changes that are important for introduction of ZEVs. These obligations are not in Massachusetts's regulations. Thus, the manufacturers claim that Massachusetts's regulations are in any case not identical to the MOAs.

Massachusetts states in its brief that the obligations of California are not "reciprocal" to manufacturers' requirements because the obligations are not dependent upon one another. Also, Massachusetts claims that CARB's obligations are not standards under sections 177 and 209.

ii. Analysis

EPA believes that Massachusetts's standards are identical to California's standards. California's commitments under the MOAs are clearly not "standards relating to the control of emissions from new motor vehicles" as that term is used under sections 177 and 209. Nor are they pre-conditions upon which the manufacturers' obligations are dependent. They are merely obligations regarding infrastructure that apply to California, not the manufacturers.

(c) Are the ZEV-Related Portions of California's MOAs Covered By a Waiver?

i. Comments

Manufacturers argued in their brief that Massachusetts' ZEV mandate is preempted because California has not received, or even requested, a waiver for the ZEV mandate in the MOAs. Manufacturers claim that Massachusetts may not rely on the waiver for California's pre-existing ZEV mandate because California's ZEV mandate for 1998-2002 has been repealed and because Massachusetts' ZEV mandate is "very different" from the original mandate.

Massachusetts argued in its brief that the ZEV mandate in the California MOAs is within the scope of the original waiver granted for California's ZEV mandate. Massachusetts notes that California need not seek a new waiver with respect to modification of standards for which EPA has already granted a waiver if the modifications do not undermine the initial decision of the Agency. Massachusetts claims that the relaxation of the ZEV mandate from the initial waiver to the MOAs does not undermine the finding from the initial waiver that California's programs is "in [17] the aggregate, at least as protective of public health and welfare as applicable Federal standards' because the vast majority of the emissions reductions in the LEV program are accounted for by the NMOG fleet average standards and the bin structure of the regulations, not the ZEV mandate. Massachusetts also notes that the relaxation of the ZEV requirements make compliance easier, thus not implicating the requirement of section 209(b) that California standards be "consistent with section 202(a)." California states, without analysis, its belief that if the ZEV provisions of the MOAs were adopted as standards, they would be within the scope of the previous waiver.

ii. Analysis

EPA believes that the ZEV requirements in the MOAs are within the scope of the original waiver granted for California's LEV program in 1993. EPA has long recognized that once the Agency has granted a waiver of preemption for a California regulation, revisions to that regulation may be considered within-the-scope of the initial waiver, and thus not require a new waiver, if the revisions 1) do not undermine California's determination that its standards, in the aggregate, are as protective of human health and welfare as comparable Federal standards; 2) are not inconsistent with section 202(a) of the Act; and 3) raise no new issues affecting the initial waiver.

Massachusetts is correct that the reduction in size of the ZEV mandate from 1998-2002 does not undermine California's "in-the-aggregate" determination. The ZEV mandate was responsible for only a small portion of the emission reductions in the LEV program. The NMOG fleet average, which remains in place, is responsible for the vast majority of emission reductions from the LEV program. EPA has received no information to indicate that the MOA ZEV requirements would violate section 202(a) of the Act, which deal with technological feasibility and lead time. As Massachusetts notes, the fact that the MOA requirement actually reduce significantly the requirement to produce ZEVs in the 1998-2002 time frame, compared to the requirements for which EPA has granted a waiver, indicates that the requirements of section 202(a) have been met. Nor does the new ZEV requirement raise any new issues affecting the initial waiver, beyond the issues discussed above. EPA will be providing a more detailed discussion of these issues shortly in the context of its response to California's request for a within-the-scope determination of its revisions to its LEV regulations. [18]

III. Conclusion

For the reasons provided above, EPA believes that under these unique circumstances, "Massachusetts's ZEV mandate is identical to a standard that California has adopted for model years 1998-2000. It is therefore permitted under CAA sections 209 and 177.[12]

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12 On August 4, 1999, President Clinton signed Executive Order 13132 on federalism ("EO 13132"). 64 Fed. Reg. 43255 (Aug. 10, 1999). EO 13132 is not effective until November 2, 1999; however, the previous Executive Order on federalism, EO 12612, which is revoked by EO 13132, remains in effect until that date. It is unclear whether this document would be subject to EO 13132 or EO 12612 as a "policy that has federal implications" or an "action limiting the policy discretion of the States." See sections 1(a) and 3(b) of both orders. In any case, EPA has, consistent with section 3(a) of both orders, closely examined the basis for the opinions contained in this document, as provided above. The problems that led Congress to enact sections 209 and 177, in particular, the need to protect interstate commerce by preventing a patchwork of differing state standards while ensuring the ability of states to enact motor vehicle standards more stringent than federal standards, are clearly problems of national significance, appropriate for national activity under section 3(b) of both orders. EPA has also consulted with states, and received comments from several states in the process of issuing this document Section 4(c) of the orders indicates that executive departments and agencies should restrict regulatory preemption of state law to the minimum level necessary to achieve the objectives of the statute. Consistent with section 4(c), the interpretations provided in this document were developed with particular concern for ensuring that preemption of state actions are minimized to the extent possible to achieve the goals of the Clean Air Act.

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